

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES, SAN FRANCISCO BRANCH OFFICE**

**AMERICAN ELEVATOR CORP., a wholly  
owned subsidiary of MARLA ELECTRIC,  
INC., AND BBQL, LLC, ALTER EGOS**

**and**

**Cases 19-CA-117057  
19-CA-121522**

**INTERNATIONAL UNION OF ELEVATOR  
CONSTRUCTORS, LOCAL 19**

*Rachel Cherem, Esq., for the General Counsel.  
Larry D. Bentley, pro se, for the Respondent.*

*David L. Tuttle, Esq., for the Charging Party.*

**DECISION**

GERALD M. ETCHINGHAM, Administrative Law Judge. I heard this case in Seattle, Washington, on July 15, 2014. On November 14, 2013,<sup>1</sup> the Charging Party International Union of Elevator Constructors, Local 19 (the Union) filed an unfair labor practice charge in Case 19–CA–117057 alleging that American Elevator Corp., a wholly owned subsidiary of Marla Electric, Inc. (AEC), and BBQL, Inc. (BBQL, and jointly, the Respondent)<sup>2</sup> violated Section 8(a)(5) and (1) of the National Labor Relations Act<sup>3</sup> (the Act). On January 29, 2014, the Union filed a second unfair labor practice charge alleging further violations of Section 8(a)(5) and (1) of the Act.

On March 28, 2014, the Regional Director for Region 19 of the National Labor Relations Board issued a consolidated complaint against Respondent alleging that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent filed a timely answer on April 11, 2014, admitting and denying various of the allegations of the consolidated complaint.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record,

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<sup>1</sup> All dates are in 2013 unless otherwise referenced.

<sup>2</sup> Respondent's name appears as amended at hearing.

<sup>3</sup> 29 U.S.C. Secs. 157 and 158(a)(5) and (1).

from my observation of the demeanor of the witnesses,<sup>4</sup> and having considered the post hearing briefs<sup>5</sup> of the parties, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Respondent AEC and Respondent BBQL are Washington state entities which provide or have provided residential and commercial sales and service of elevators, stair lifts, and vertical platforms. Respondent stipulated at hearing that it satisfies the Board's retail and nonretail jurisdictional standards. Thus I find that Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. Further, Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act. Accordingly, this dispute affects commerce and the Board has jurisdiction of this case pursuant to Section 10(a) of the Act.

### II. COLLECTIVE-BARGAINING RELATIONSHIP

Larry and Marilyn Bentley own 100 percent of Marla Electric, Inc. (Marla), an Oregon corporation, which owns AEC. Larry Bentley (Bentley) was president and CEO of AEC from the time it was purchased from former owner Mark Vendetti (Vendetti) by Marla on April 1, 2009. AEC maintained offices including a warehouse and storage facility in Bellevue, Washington, at 2110 116th Avenue Northwest, Suite 5.

At the time of purchase, the employees of AEC were represented by the Union pursuant to a short form agreement signed by prior owner Vendetti agreeing to be bound to the Thyssen Krupp Elevator contract with the Union effective July 9, 2007, and terminating at midnight on July 8, 2012 (here, the TK contract), as well as any successor agreements. The TK agreement was succeeded by an agreement between the National Elevator Bargaining Association and the Union in effect from July 9, 2012, to July 8, 2017 (the NEBA contract).

The bargaining unit set forth in both contracts recognizes the Union pursuant to Section 9(a) of the Act and includes all of AEC's elevator constructor mechanics, helpers,

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<sup>4</sup> There are few disputes of fact. To the extent necessary, credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings here, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence, or because it was in and of itself incredible and untrustworthy.

<sup>5</sup> The General Counsel's motion to strike portions of Respondent's posthearing brief is granted to the extent that any arguments not supported by facts in the record have been disregarded.

and apprentices. No evidence was offered to show inappropriateness of this historical unit.<sup>6</sup> Thus, I find this is an appropriate bargaining unit within the meaning of Section 9(b) of the Act.

Initially AEC honored the terms of the TK contract and retained the 17–18 employees who worked for AEC under its prior owner. Moreover, AEC admits that it continued the same operations, i.e., residential and commercial elevator, stair lift, and vertical platform sales and service, with many of the same major clients, and the same equipment. Given this substantial continuity, there is no dispute and I find that AEC succeeded to the bargaining obligation of the seller as a *Burns* successor<sup>7</sup> and since the purchase, the Union has been the exclusive collective-bargaining representative of unit employees.

### III. JULY 2012 CESSATION OF BENEFIT CONTRIBUTIONS

Both the TK and NEBA contracts require that employers make contributions to employee benefit plans including a pension plan (Art. XVIII), a health and welfare plan (Art. XVII), an annuity plan (Art. XVIII(A)), an education fund (Art. XIX), and a work preservation fund (Art. XX). AEC honored these obligations until May 2012. At that time, due to financial difficulties, AEC missed payments to the trust. Although AEC signed a settled agreement with the Trusts, ultimately it was unable to comply. In July 2012, AEC quit making contributions to the benefits plan as required by the TK and NEBA contracts. Specifically, AEC did not make payments to the National Elevator Industry Pension Plan, the health benefit plan, the education program fund, the elevator industry work preservation fund, and the elevator constructors annuity. Bentley explained that he was unable to make these contributions due to lack of funds. He did not contact the Union or request bargaining. However, AEC continued to file monthly reports with the trust funds.

### IV. JANUARY 2013 CESSATION OF VACATION PAY

The TK and NEBA contracts contain identical requirements that employers pay vacation pay to employees in a lump sum on January 15 and July 15 (Art. XII). The lump-sum amount is based on years of service and hours worked. The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by failure to make these payments since January 15, 2013. Although this allegation was denied in AEC's answer, at hearing Bentley agreed that the lump sums were not paid at the time they were due. He stated that over the next few months employees received pay when taking time off. It is undisputed that AEC did not contact the Union about this issue.

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<sup>6</sup> Change in ownership does not destroy bargaining units that have an established history of collective bargaining unless the units no longer conform to other standards of appropriateness. *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994) (citing *Indianapolis Mack Sales & Service*, 288 NLRB 1123 fn. 5 (1988), enfd. 84 F.3d 637 (2d Cir. 1996).

<sup>7</sup> In *NLRB v. Burns International Security Services*, 406 U.S. 272, 281 (1972), the Court held that where there is a substantial continuity between the enterprises, an employer succeeds to the bargaining obligation of its predecessor if it retains a majority of the employees in an appropriate bargaining unit

## V. FORMATION AND OPERATION OF BBQL

In April 2013, Marla began efforts to start BBQL in order to handle the residential clients of AEC. On July 17, 2013, Marla obtained the certificate of formation of BBQL. On July 16 or 17, 2013, the Union pulled its 4 remaining employees from AEC pursuant to paragraph 10 of the short form agreement.<sup>8</sup> In order to perform further work, AEC subcontracted the work to three different firms.

Due to arrearages on payment of the excise tax, on November 15, 2013, the Washington State Department of Revenue rescinded AEC's license to operate. On the following day, employees of AEC were transferred to BBQL. Bentley became the manager of BBQL. His wife Marilyn became vice-president and handled accounts payable and their son William Bentley who handled inventory and residential sales at AEC transferred to sales for BBQL for a time. AEC's bookkeeper Karla Lynch and dispatcher Nedra Meham both transferred from AEC to BBQL, retaining their former duties. BBQL performed the same work for many AEC clients.

Initially BBQL used the AEC facility, office supplies, and equipment. No payment was made by BBQL to AEC for these assets.

By letter of December 3, 2013, on AEC letterhead, Bentley wrote to an AEC client that AEC was transferring its service and maintenance requirements to BBQL and that BBQL would assume all AEC assets and maintenance and service contracts. He noted that the management team at BBQL would remain the same as the management team at AEC. Similar letters were sent to other AEC clients. Most of BBQL's clients had been AEC clients.

In hiring mechanics for BBQL in September, Bentley told applicants that it was a nonunion shop. These new employees were not paid pursuant to the NEBA contract rates. The employees were not paid any benefits.

## VI. ANALYSIS

There is no dispute that AEC ceased all benefit payments since July 2012. I have further found that lump-sum vacation payments have not been made since January 2014. There was no prior notice to the Union or opportunity to bargain before discontinuance of the payments. Thus, Respondent altered mandatory terms and conditions of its unit employees in violation of Section 8(a)(5) and (1) of the Act. *Merryweather Optical Co.*, 240 NLRB 1213, 1215 (1979) (refusal to make required fringe-benefit payments established by a collective-bargaining agreement

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<sup>8</sup> Par. 10 provides, "It is understood and agreed that notwithstanding the no-strike obligation in Article XIV of [the TK contract] in the event the Employer fails to pay wages or vacation pay when due or the Employer is over fifteen (15) days delinquent in making contributions to the fringe benefit funds, the Union shall have a right to engage in a strike against the Employer until such time as the wages or vacation pay is paid or the Employer has paid all amounts due to the fringe benefits funds, including interest and liquidated damages, if any."

constitutes a unilateral change in terms and conditions of employment); *Schmidt-Tiago Construction Co.*, 286 NLRB 342, 343 (1987) (cessation of payments to vacation trust fund unlawful even though employees were paid directly by employer).

5 In July 2013, after the Union withdrew unit employees from employment, AEC operations ceased and all further operation was transferred to BBQL, a nonunion entity. The collective-bargaining agreement was fully repudiated at this time. Contract wages, benefits, and terms and conditions of employment were ignored. Unit work was initially subcontracted. Later, employees were hired at noncontract wage rates with no benefits.

10 Respondent's sole defense is that it was unable to meet these obligations due to financial trouble. Respondent provided evidence of its financial status which included a decline in sales revenues as well as net losses. However, financial inability does not relieve an employer from its obligation to bargain with the Union. See, e.g., *RBE Electronics of S.D.*, 320 NLRB 80, 81–82 (1995) (economic exigency shown if proposed changes were “compelled” and exigency caused by external events beyond the employer's control or not reasonably foreseeable). Respondent has not satisfied this burden.

20 Both AEC and BBQL, as alter egos, are responsible for these unfair labor practices. A change in corporate form that involves no more than a “technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management” may be disregarded and the alter ego “is subject to all of the legal and contractual obligations of the predecessor.” *Howard Johnson Co. v. Hotel & Restaurant Employees Detroit Local Joint Executive Board*, 417 U.S. 249, 259 fn. 5 (1974). The determination of alter ego status is a question of fact based on all attendant circumstances. *Southport Petroleum v. NLRB*, 315 U.S. 100, 106 (1942).

30 Ownership, management and supervision, business purpose, operations, equipment, and customers are the typical factors determinative of whether alter ego status exists. *Crawford Door Sales Co.*, 226 NLRB 1144, 1144 (1976). If these factors are substantially identical, an alter ego relationship will ordinarily be found. *Id.* A further consideration is whether the purpose behind creation of an alleged alter ego was legitimate or was to evade responsibilities under the Act,<sup>9</sup> that is, if the second company was created in order to allow the first company to evade its responsibilities under the Act.<sup>10</sup> Not all factors are necessary to an alter ego finding and no single factor is determinative,<sup>11</sup>

40 Here, AEC and BBQL had the same managers, supervision, and owners; substantially identical clients, and the same operations. Equipment and assets were transferred from AEC to BBQL without any payment. All nonunit employees remained the same. Initially, the unit work was subcontracted. Although BBQL may have been created, as Respondent asserts, to take over the residential clients of AEC, when the Union work force left, BBQL was quickly relegated to

<sup>9</sup> *U.S. Reinforcing*, 350 NLRB 404 (2007) (citing *Liberty Source W*, 344 NLRB 1127, 1136 (2005).

<sup>10</sup> *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 8 (2007).

<sup>11</sup> *U.S. Reinforcing*, supra, 350 NLRB at 404, citing *Liberty Source W*, 344 NLRB 1127, 1136 (2005); *Standard Commercial Cartage*, 330 NLRB 11, 13 (1999); *MIS, Inc.*, 289 NLRB 491, 492 (1988).

taking over all of AEC’s business in a nonunion context. Thus, BBQL was quickly usurped to evade responsibilities under the Act. There can be no doubt that AEC and BBQL constitute alter egos and I so find.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.
2. By ceasing payments to the trust funds and ceasing payment of lump-sum vacation pay without providing the Union with prior notice and an opportunity to bargain over proposed changes, the Respondent has violated Section 8(a)(5) and (1) of the Act.
3. By repudiating its collective-bargaining agreement with the Union, Respondent has violated Section 8(a)(5) and (1) of the Act.
4. The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent shall be required to rescind the unilateral change in payment to the trust funds and payment of lump-sum vacation pay. It shall further be required to make employees whole for losses incurred during the period of time the Respondent did not honor these obligations but only as to lump-sum vacation pay. The General Counsel does not seek reimbursement to the trusts because these funds are being recouped through a separate lawsuit filed by the Union’s trusts. The lump-sum vacation payments are not part of the lawsuit and the General Counsel seeks a remedy for this violation.

Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate the affected employees for any adverse tax consequences of receiving lump-sum backpay awards covering more than 1 calendar year. *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.<sup>12</sup>

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<sup>12</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## ORDER

The Respondent, American Elevator Corp., a wholly owned subsidiary of Marla Electric, and BBQL, LLC, alter egos, located in Bellevue, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- a) Failure to make required payments to employee benefit plans including the pension plan, the health and welfare plan, the annuity plan, the education fund, and the work preservation fund, failure to make required lump-sum vacation payments, and failure to honor the collective-bargaining agreement with the Union.
- b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- a) Restore the status quo ante by rescinding the unilateral changes to benefit payments and lump-sum vacation payments.
- b) Recognize and on request, bargain with the Union as the exclusive representative of its elevator constructor mechanics, helpers, and apprentices concerning terms and conditions of employment.
- c) Abide by the agreement between the National Elevator Bargaining Association and the Union in effect from July 9, 2012, to July 8, 2017.
- d) Make employees whole for loss of lump-sum vacation pay as set forth in the remedy section of this decision.
- e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- f) Within 14 days after service by the Region, post at its facility in Bellevue, Washington, copies of the attached notice marked “Appendix.”<sup>13</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and

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<sup>13</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 25, 2013.

- g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 25, 2014



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Gerald M. Etchingham  
Administrative Law Judge



## **APPENDIX**

**NOTICE TO EMPLOYEES**  
Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### **FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

**WE WILL NOT** make any changes to the terms in our contract without providing International Union of Elevator Constructors, Local 19 prior notice and an opportunity to bargain over proposed changes, as the sole and exclusive bargaining representative of our employees.

**WE WILL NOT** repudiate the contract between the Union and the National Elevator Bargaining Association effective from July 9, 2012, to July 8, 2017.

**WE WILL NOT** in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

**WE WILL** rescind the unilateral change to contributions to the fringe-benefit funds and the lump sum payment of vacation pay.

**WE WILL** abide by the National Elevator Bargaining Association contract.

**WE WILL** make employees whole for any losses due to our failure to pay lump-sum vacation payments

**WE WILL** file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

**WE WILL** compensate employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

**AMERICAN ELEVATOR CORP., a wholly  
owned subsidiary of Marla Electric, Inc.  
and BBQL, LLC, alter egos**

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

915 2nd Avenue, Federal Building, Room 2948  
Seattle, Washington 98174-1078  
Hours: 8:15 a.m. to 4:45 p.m.  
206-220-6300

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/19-CA-117057](http://www.nlrb.gov/case/19-CA-117057) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 206-220-6284.